

## Rule 5, Ariz. R. Crim. Proc.

### **PRELIMINARY HEARINGS – Magistrate cannot grant motion to suppress evidence.....Revised 12/2009**

A magistrate is constrained as to his ability to deal with evidentiary issues in a preliminary hearing. Rule 5.3(b), Ariz. R. Crim. P., provides, “Rules or objections calling for the exclusion of evidence on the ground that it was obtained unlawfully shall be inapplicable in preliminary hearings.” Therefore, a magistrate at a preliminary hearing *may not* grant a motion to suppress evidence. “It is clear ... that a magistrate at a felony preliminary hearing has no jurisdiction to suppress evidence based on an unlawful search and seizure. The power to suppress evidence seized as a result of an unlawful search and seizure rests exclusively with the superior court.” *State v. Joachim*, 202 Ariz. 566, 569, ¶ 13, 48 P.3d 516, 519 (App. 2002) (internal citations omitted), *see also* Comment to Rule 5.3(b), Ariz. R. Crim. P.

In *Dunlap v. Superior Court*, 169 Ariz. 82, 89, 817 P.2d 27, 34 (App. 1991), the Court of Appeals, citing *State v. Jacobson*, 106 Ariz. 129, 130, 471 P.2d 1021, 1022 (1970), explained that a magistrate at a preliminary hearing lacks jurisdiction to grant a motion to suppress evidence on the grounds that it resulted from an unlawful search and seizure. Only a superior court can grant such a motion to suppress. However, “a presiding magistrate nevertheless could rule on the admissibility of evidence in a preliminary hearing when the objection alleged the evidence was the product of an unlawful search and seizure. ... Thus

*Jacobson* distinguished between the trial court's power to order unlawful evidence suppressed in a prosecution, and a magistrate's power to rule against admissibility of unlawful evidence at a preliminary hearing." *Dunlap, id.*